85-1504

No. .....

Supreme Court, U.S.
FILED
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CLERK

In The
# Supreme Court of the United States
October Term, 1985

MARITIME OVERSEAS CORPORATION, AND SECOND SHIPMOR ASSOCIATES,

*Petitioners,*

v.

WALTER J. BRUNNER,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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of Counsel

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## QUESTIONS PRESENTED FOR REVIEW

I. Do separate theories of recovery, based upon negligence and unseaworthiness, relieve the court of its obligation to review a special verdict to determine if inconsistent jury findings can be reconciled?

II. If a vessel's deck has been determined not to be in any manner unsafe or unfit, can a shipowner be found negligent because of the condition of the deck?

## LIST OF PARTIES

A. Those parties listed in the caption of this case.

B. The following are companies interested in or affiliated with Petitioner(s) or the *SS Overseas Ohio:*

1. San Jose Tankers Inc.
2. Moran Tankships No. 2, Inc.
3. OSG Bulk Ships, Inc.
4. Overseas Shipholding Group, Inc.
5. F.C.L. Ship Five, Inc.
6. First Chicago Leasing Corporation.
7. Manufacturers Hanover Trust Company.
8. CIT Corporation.
9. Assuranceforeningen GARD.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maritime Overseas Corporation and Second Shipmor Associates, respectfully pray that a writ of certiorari issue to review the decision rendered in this case by the United States Court of Appeals for the Fifth Circuit.

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## OPINIONS BELOW

The Jury Interrogatory form, with answers, appears as Appendix A.

The District Court Judgment appears as Appendix B.

A copy of the order denying Petitioners' Motion for New Trial appears as Appendix C. The Lower Court did not render a written opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 779 F.2d 296, appears as Appendix D. No petition for rehearing was sought from the Fifth Circuit.

The judgment of the Fifth Circuit appears as Appendix E.

———o———

## JURISDICTION

The opinion and judgment in the United States Court of Appeals for the Fifth Circuit was rendered in this case on January 3, 1986. This petition for writ of certiorari was filed within 90 days of January 3, 1986, as is

required by 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. § 1254(1).

———o———

## STATUTES AND RULES INVOLVED

1. The Jones Act, 46 U.S.C. § 688, states:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . . ."

2. The Federal Employers' Liability Act, 45 U.S.C. § 51, which governs railway employers, states that the employer shall be liable for:

> "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

———o———

## STATEMENT OF THE CASE

### I. The Proceedings Below

In this seaman's personal injury claim, plaintiff alleged injuries to his back as a result of a slip and fall aboard the *SS Overseas Ohio* on a rainy night in June, 1978. Plaintiff contended that the reason for his fall was the presence of a 10-foot wide patch of oil on the deck of the *SS Overseas Ohio* in the area where one would normally walk from the gangway to the vessel's house. The claimed presence of the oil was the sole allegation of negligence and the sole allegation of unseaworthiness.

The matter went to trial before a jury on June 14 and 15, 1984, on both the negligence and unseaworthiness theories. The jury returned with a special interrogatory verdict finding the vessel was not unseaworthy, but nevertheless finding defendants negligent.

Judgment was entered in favor of plaintiff and against defendants. Defendants thereafter moved the lower court to set aside the judgment on the basis of the inconsistency of the findings of negligence and of seaworthiness. The motion was denied and a timely appeal was taken by defendants to the United States Court of Appeals for the Fifth Circuit.

Oral argument was held before the appellate court and an opinion was rendered on January 3, 1986, affirming the judgment of the district court. It is for review of that affirmance that petitioners seek a writ of certiorari.

### II. Statement of Relevant Facts

Walter Brunner, plaintiff, was serving on the *SS Overseas Ohio* as a third assistant engineer. The *SS*

*Overseas Ohio* was a relatively new ship, having been delivered to the owners less than nine months before the incident.

Plaintiff claimed that his accident occurred at night, while it was raining, when he returned to the vessel from shore leave in Panama. He was walking aft on the vessel's main deck proceeding from the gangway to his quarters. When he was en route to the vessel's house, allegedly he slipped in a 10-foot wide patch of oil on the deck.

There was no evidence of any malfunction of the ship's equipment or of any defect that could have allowed oil to appear on deck as claimed by plaintiff. It had been four days since any cargo of oil had been on the vessel. There was no fuel oil being transferred nor could it have been transferred forward of the house to the area where plaintiff claimed he slipped.

While all of the witnesses at trial admitted that it was not proper for there to have been oil on the vessel's deck, no one other than plaintiff claimed to have seen any oil on deck. No one could give any explanation of how the oil could have appeared on the deck. Plaintiff himself could not explain the source of the oil.

Throughout the trial, the only liability issue was whether there was oil on the deck where plaintiff claimed to have slipped. The opening statements, the evidence, and the closing arguments were all directed to the issue of whether there was oil on the deck. The judge's charge to the jury limited the issue to whether this claimed oil actually was on the deck.[1] From beginning to end, there was one and

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[1] Excerpts from the opening and closing statements and from the charge are attached as Appendices F and G.

only one pivotal fact issue: was there oil on the deck where plaintiff claimed he slipped?

The jury was given a special interrogatory form asking separate questions about negligence, unseaworthiness, causation, contributory negligence, and damages. After deliberating, it returned with a verdict finding negligence, but finding no unseaworthiness, and awarding plaintiff no damages. The judge immediately sent the jury back and ordered them to answer the question on damages. The jury returned, and following the instructions of the judge awarded damages of $75,000.

Judgment was entered for plaintiff. Defendants moved for a new trial because of the inconsistent verdict. The motion for a new trial was denied, and the lower court was affirmed on appeal in the United States Court of Appeals for the Fifth Circuit.

## ARGUMENT

Petitioners seek review of the Fifth Circuit's affirmance of a judgment based on a verdict that we believe is plainly inconsistent. The Fifth Circuit has effectively held that the shipowner can be found negligent for a condition despite the fact that the condition did not render the vessel unsafe or unfit in any manner.

In so holding, the Fifth Circuit erred:

(1) By its failure to review properly the obvious inconsistency of the verdict, limiting its inquiry to the inappropriate idea that the conflict in the jury's answers involved two separate theories of alleged liability; or

(2) If it did properly examine the inconsistency of the verdict, it incorrectly extended the obligation of the shipowner under the Jones Act to a new, and unprecedented, and obviously erroneous level, by holding that a shipowner may be found negligent for failing to correct a condition which is reasonably safe, that is, seaworthy.

The initial proposition is contrary to traditional notions of due process and the fundamental rule that a court has no authority to enter judgment upon a verdict which is not reasonably clear and unambiguous. The second proposition is an unsustainable extension of the doctrine of negligence, making negligence stricter than strict liability (unseaworthiness), utterly contrary to the negligence standard on which the Jones Act claim has to be based, and contrary to this Court's precedent.

**I. A writ should issue because the Fifth Circuit has effectively held that a claim brought under two different theories of recovery can support a judgment notwithstanding the plain fact that the jury's answers to the interrogatories are irreconcilably inconsistent under the facts of the case.**

Raising the talismanic flag of separate theories of recovery, the Fifth Circuit found no inconsistency in simultaneous findings that the vessel's deck was reasonably safe and fit, but that the shipowner acted negligently in failing to make the deck reasonably safe and fit. The rationale of the Fifth Circuit's holding was that because theories of unseaworthiness and Jones Act negligence are "separate", there is no inconsistency where a jury finds liability upon one theory (the situs was negligently unsafe), but finds simultaneously that the situs was safe and fit.

Such a view completely ignores the fact that both theories of recovery in this case, as in many cases with multiple theories of recovery, arise from a single factual situation.

It is true that the concepts of seaworthiness and negligence have evolved under maritime law as distinct and separate theories of recovery. Yet, "the Jones Act count and the unseaworthiness count overlap completely: they derive from the same accident and look toward the same recovery." Gilmore & Black, *The Law of Admiralty*, p. 383 (2nd Ed. 1975). This Court has recognized that the claims are alternative "grounds" for a single cause of action. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225, 2 L.Ed.2d 1272, 1276 (1958).

In a trial situation, a jury is required to consider the underlying factual basis common to both theories. The

duty and power of the court to review resulting verdicts, however, is not restricted by any "Chinese wall" separating different legal but identical factual theories of recovery. A verdict must make sense in order to support a judgment, regardless of how many legal theories are presented. If the verdict is hopelessly flawed, judgment should not be entered.

On the underlying facts of this case, there can be no reasonable or sensible explanation for the jury's finding that the shipowner was negligent in failing to remedy an unsafe condition of the vessel's deck where the deck condition was at the very same time found to be reasonably fit and safe. The verdict is inconsistent.

The Fifth Circuit, in its attempt to uphold the verdict, has ignored the absolutely irreconcilable character of the two answers, and has departed from traditional notions of fairness and due process by affirming a judgment on this inconsistent verdict. Because such action is in conflict with traditional notions of justice, petitioners pray that a writ of certiorari issue.

**II. The Fifth Circuit's decision is in direct conflict with decisions of the United States Courts of Appeals for the First, Second, and Fourth Circuits, and is contrary to similar decisions of the Third, Eighth, and Eleventh Circuits.**

The same issue has been previously considered, both in the context of the consistency of verdicts and in the context of the propriety of directed verdicts. If a directed verdict is given after the jury finds there to be no unseaworthiness, the same fundamental issue is presented to the Court: does the finding of seaworthiness obviate the

necessity of the jury's determining the question of negligence when the sole allegation of negligence is that the shipowner failed to maintain its vessel in a reasonably safe condition?

The Fifth Circuit, citing *Kokesh v. American S.S. Co.*, 747 F.2d 1092 (6th Cir. 1984), in support of its position, nevertheless recognized that its holding was directly contrary to the Second Circuit's *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660 (2nd Cir. 1975). The Second Circuit there considered the issue in its review of an inconsistent verdict. There, as here, the question was also the alleged presence of oil on deck. The jury had found negligence but no unseaworthiness, and the court concluded that the answers could not possibly be reconciled. Special verdicts should be reconciled wherever possible, but " . . . there must be a limit where, as here, the special verdicts are quite irreconcilable, the plaintiff's case is tenuous, and the suspicion strong that the judgment was predicated upon confusion or sympathy or both."

In a directed verdict context, the same issue was considered by the First Circuit in *Peymann v. Perini Corp.*, 507 F.2d 1318 (1st Cir. 1974), *cert. denied*, 421 U.S. 914, and the same result reached. See also *Meyers v. Isthmiam Lines, Inc.*, 282 F.2d 28 (1st Cir. 1960), *cert. denied*, 365 U.S. 804, 5 L.Ed.2d 461 (1961).

The Fourth Circuit spoke to the same issue with the same result in *Blankenship v. Ellerman's Wilson Line New York, Inc.*, 265 F.2d 455 (4th Cir. 1959). There, the jury found the vessel seaworthy, and the court granted

summary judgment, on the same facts, on the negligence theory.[2]

Similar considerations have governed cases in non-maritime fields where multiple theories of recovery have led to inconsistent verdicts. *Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir. 1984); *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155 (8th Cir. 1978); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3rd Cir. 1983); *Werner v. Upjohn*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080, 66 L.Ed.2d 804 (1981).

The Courts of Appeals are thus clearly seen to be in conflict on their ability to give effect to concurrent jury findings of negligence and unseaworthiness (strict liability). Because Jones Act negligence and unseaworthiness claims are usually combined in a single trial, this conflict needs to be resolved by this Court.

**III. A writ should issue because the Fifth Circuit has extended the shipowner's obligation under the Jones Act beyond the well-settled construction and application of the statute, thereby making the shipowner the virtual insurer of a seaman.**

If it is assumed, *arguendo*, that the Fifth Circuit did go beyond the "separate theories of recovery" basis in its determination that the findings of the jury were consistent, then its holding necessarily implies that the Jones Act negligence standard is even stricter than that of strict liability. In other words, even though a shipowner may

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[2] District courts in the Third Circuit are also in agreement. See *Nosal v. Calmar S.S. Corp.*, 339 F.Supp. 1235 (E.D.Pa. 1972), aff'd without opinion 475 F.2d 1395 (3rd Cir. 1973); *Poller v. Thorden Lines A/B*, 336 F.Supp. 1231 (E.D.Pa. 1970).

keep the deck of its vessel fit and safe in every manner, it nevertheless can be held liable under some theory of "negligence." Such has never been the law, was never intended to be the law, and cannot be the law.

Long standing precedent interpreting negligence under the Federal Employers' Liability Act and the Jones Act requires that there be some breach of duty on behalf of the employer before the general damages provided for by the statutes can be awarded. *Inman v. Baltimore & Ohio R. Co.*, 361 U.S. 138, 4 L.Ed.2d 198 (1959); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377-78, 77 L.Ed. 368, 374-375 (1932). Under the facts of the instant case, with the vessel having been found seaworthy, there simply was no breach of any duty owed to plaintiff. There was not and is not any way that the verdict properly could be construed as consistent.

———o———

## CONCLUSION

For the above and foregoing reasons, Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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## APPENDIX A

CIVIL ACTION NO. 82-4645

SECTION "I"

WALTER R. BRUNNER
VERSUS
MARITIME OVERSEAS CORPORATION,
SECOND SHIPMOR ASSOCIATES, ET AL

We, the Jury in the above-captioned action, unanimously find as follows:

1. Do you find from a preponderance of the evidence that the Defendants, Maritime Overseas Corporation and Second Shipmor Associates, were negligent at the time of the Plaintiff's accident? Answer "Yes" or "No."

   Answer *Yes*

   If you have answered Question No. 1 "Yes," proceed to Question No. 2. If you have answered Question No. 1 "No," DO NOT answer Question No. 2. Proceed, instead, to Question No. 3.

2. Do you find from a preponderance of the evidence that the Defendants' negligence was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

   Answer *Yes*

   However you have answered Question No. 2, proceed to Question No. 3.

3. Do you find from a preponderance of the evidence that the S/S OVERSEAS OHIO was unseaworthy at the time of the Plaintiff's accident? Answer "Yes" or "No."

   Answer *No*

If you have answered Question No. 3 "Yes," proceed to Question No. 4. If you have answered Question No. 3 "No," DO NOT answer Question No. 4. Proceed, instead, to Question No. 5.

4. Do you find from a preponderance of the evidence that the vessel S/S OVERSEAS OHIO's unseaworthiness was a legal cause of the Plaintiff's injuries? Answer "Yes" or "No."

Answer *No*

However you have answered Question No. 4, proceed to Question No. 5.

Answer Question No. 5 only if you have answered "Yes" to either or both Question No. 2 and Question No. 4. Otherwise, sign and date the verdict form and return to the Courtroom.

5. Do you find from a preponderance of the evidence that the plaintiff was contributorily negligent? Answer "Yes" or "No."

Answer *Yes*

If you have answered Question No. 5 "Yes," proceed to Question No. 6. If you have answered Question No. 5 "No," DO NOT answer Question No. 6. Proceed, instead, to Question No. 8.

6. Do you find from a preponderance of the evidence that the Plaintiff's contributory negligence was a legal cause of his injuries? Answer "Yes" or "No."

Answer *Yes*

If you have answered Question No. 6 "Yes," proceed to Question No. 7. If you have answered Question No.

6 "No," DO NOT answer Question No. 7. Proceed, instead, to Question No. 8.

7. To what extent did the Plaintiff's contributory negligence cause his injuries? Answer in terms of a percentage (0% to 100%).

Answer *50%*

However you have answered Question No. 7, proceed to Question No. 8.

8. If you have answered "Yes" to either or both Question No. 2 or Question No. 4, what amount, by a preponderance of the evidence, do you find will adequately compensate the Plaintiff for his injuries? DO NOT reduce the amount in the event that you have found the Plaintiff was contributorily negligent. If any reduction is appropriate, the Court will make the reduction. Answer by means of a numerical figure.

*$75,000*

However you have answered Question No. 8, please sign and date the verdict form and return to the courtroom.

*6/15/84*
Date

*/s/ Mrs. Wanda D. Kennedy*

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 82-4645

SECTION: I

WALTER R. BRUNNER

VERSUS

MARITIME OVERSEAS CORPORATION and
SECOND SHIPMOR ASSOCIATES

J U D G M E N T

This matter came on for jury trial on a previous day. Now therefore, considering the answers of the jury to the interrogatories propounded to them, and further considering the direction of the Court as to the entry of judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Walter R. Brunner, and against defendants, Maritime Overseas Corporation and Second Shipmor Associates, in the amount of $37,500.00, plus legal interest and costs.

New Orleans, Louisiana, this 19 day of June, 1984.

/s/ Henry A. Mentz, Jr.
United States District Judge

Date of Entry June 19, 1984

## APPENDIX C

82-4645

(2)

SEAMAN CASE
JURY

WALTER R. BRUNER

Plaintiffs

v.

MARITIME OVERSEAS CORPORATION and John Doe, the said name being fictitious, the true identity of the defendant being presently unknown

SECOND SHIPMORE ASSOCIATES

Defendants

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

46 USC 688—INJURY, MARINE, SEAMAN, JONES ACT

TRANSFER CASE FROM SOUTHERN DISTRICT OF NEW YORK TO THE EASTERN DISTRICT OF LOUISIANA

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WEDNESDAY, JULY 18, 1984 10:00 A.M.

11. MOTION OF DEFT, MARITIME OVERSEAS CORPORATION AND SECOND SHIPMOR ASSOCIATES, TO SET ASIDE VERDICT AND FOR NEW TRIAL:

Argument—Denied.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALTER R. BRUNNER,

*Plaintiff-Appellee,*

v.

MARITIME OVERSEAS CORP. SECOND
SHIPMOR ASSOCIATES, Et Al.,

*Defendants-Appellants.*

No. 84-3569

OPINION

Filed January 3, 1986

Before Thomas M. Reavley, Jerre S. Williams and Patrick E. Higginbotham, Circuit Judges.

Opinion by Judge Jerre S. Williams

Appeal from the United States District Court
for the Eastern District of Louisiana
Henry A. Mentz, Jr., District Judge, Presiding

OPINION

JERRE S. WILLIAMS, Circuit Judge:

This case raises the issue of whether different answers to negligence and unseaworthiness interrogatories in a maritime personal injury case constitute an inconsistent verdict. Because negligence and unseaworthiness are totally separate concepts, we find no conflict and affirm.

Appellee Walter R. Brunner brought the present action against appellants Maritime Overseas Corporation and Second Shipmor Associates under the Jones Act, 46 U.S.C. § 688, seeking damages for injuries sustained when he slipped and fell on board the S/S OVERSEAS OHIO. Brunner alleged that his fall was caused by the "treacherous" condition of the deck due to an oil spill. The case was tried to a jury. The only factual issue in the case was whether there was an oil spill on the deck the night that Brunner slipped.

The jury was asked special interrogatories concerning: (1) whether the vessel was unseaworthy; (2) whether there was negligence; and (3) the quantum of damages. The district court instructed the jury in the charge that unseaworthiness and negligence were separate theories of recovery. It is clear in the record, however, that the sole basis of both the unseaworthiness and Jones Act negligence claims was the oil spill, and the judge acknowledged in the charge that appellee's claims were both based upon the same oil spill.

The jury found that appellants were negligent and also found that the S/S OVERSEAS OHIO was not unseaworthy at the time of appellee's accident. They found Brunner to be fifty percent contributorily negligent. The jury at first declined to award any damages, and was sent back for further deliberation by the judge. The jury then awarded $75,000 damages. The judge entered judgment for appellee in the amount of $37,500 representing the 50% negligence attributable to appellants. The district court denied appellants' motion for new trial, which urged that the jury's answers to the interrogatories were inconsistent. We affirm the judgment based upon the jury verdict.

I.

[1] The threshold question is whether appellants have preserved their error. At the time the charge was given to the jury, appellants did not object to the charge on the ground that the interrogatories could result in inconsistent answers. Appellants also did not object when the verdict was returned. The consideration of this issue would have been better served if appellants had made their objection at least at the time that the jury returned its verdict so that the court could evaluate whether or not it was inconsistent and could have sent it back to the jury to reconsider. But, appellants did not waive their right to complain of inconsistent answers by failing to object. If answers to jury interrogatories are in irreconcilable conflict, then the judge has no authority to enter judgment based upon those answers. *Fugitt v. Jones,* 549 F.2d 1001, 1005 (5th Cir. 1977). Thus, failure to object does not waive the right to raise the issue in a motion for new trial when answers to interrogatories result in irreconcilable conflict. *Guidry v. Kim Manufacturing Company,* 598 F.2d 402, 407 (5th Cir. 1979), *cert. denied,* 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980); *Mercer v. Long Manufacturing NC, Inc.,* 671 F.2d 946, 947 (5th Cir. 1982); *Alvarez v. J. Ray McDermott,* 674 F.2d 1037 (5th Cir. 1982). We conclude that appellants have met the procedural requirement to raise the inconsistent verdict claim.

II.

The issue on the merits which is raised by this appeal is whether a jury finding of negligence is consistent with a jury finding of no unseaworthiness when there is but one factual circumstance on which both findings can be based.

In light of the separate nature of the negligence and unseaworthiness causes of action, we find no irreconcilable conflict.

*Separate Causes of Action*

The history of the unseaworthiness claim shows that it developed independently of Jones Act negligence and has been treated as a separate cause of action ever since. The origin of the seaman's right to recover for injuries caused by an unseaworthy ship can be found in European and English law dating back to 1597.[1] The earliest mention of unseaworthiness in American judicial opinions appears in cases in which mariners were suing for their wages. Mariners were required to prove the unseaworthiness of the vessel to excuse their desertion or misconduct which would otherwise result in a forfeiture of their right to wages.

In the late nineteenth century, American admiralty courts developed the doctrine that a seaman had a right to recover for personal injuries beyond maintenance and cure. It became generally accepted that a shipowner was liable to a seaman injured in the service of a ship as a consequence of the owner's failure to provide a seaworthy vessel. *See The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903).

[2] In 1920, Congress passed the Jones Act. This act gave recovery to seamen for injuries sustained through the negligence of the shipowner. Two years later, in *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 42 S.Ct. 475, 66

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[1]This historical discussion is taken in substance from the Supreme Court opinion in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960).

L.Ed. 927 (1922), the Court made its first statement that seaworthiness was unrelated to the standard of ordinary care which applies in a personal injury case. In *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), the Court gave an unqualified stamp of approval to the view that the duty of the shipowner and his agents to provide a seaworthy ship is unrelated to the jurisprudential concept of negligence. The Supreme Court has steadfastly adhered to the principle that unseaworthiness is a completely separate concept from negligence. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971); 1B Benedict on Admiralty § 23 (1984); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 80 S.Ct. 926, 932, 4 L.Ed.2d 941, — (1960) ("From that date to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.").

*Inconsistent Answers?*

We examine whether the answers to the jury interrogatories in the present case are irreconcilable keeping the separate historical development of negligence and unseaworthiness in mind. In *Kokesh v. American Steamship Co.*, 747 F.2d 1092 (6th Cir. 1984), the Sixth Circuit Court of Appeals has recently held that findings of seaworthiness and negligence based upon a single factual allegation are not inconsistent. In *Kokesh*, the plaintiff alleged that he slipped and fell on a ship due to an accumulation of polluted water on the deck. He sought damages based upon both negligence and unseaworthiness. The jury found

the vessel to be seaworthy, but awarded damages for negligence just as did the jury in the case before us. The Court held that the jury findings could be reconciled because "[t]he jury could have concluded from the proof that although the defendant did not exercise ordinary care in allowing the deck to be made slippery by overflow from the vessel's ballast tanks, the flooding of the deck did not make the vessel unseaworthy." *Id.* at 1094. Thus, *Kokesh* held unequivocally that the verdicts were not inconsistent. The Second Circuit Court of Appeals has held to the contrary in *Bernardini v. Rederi A/B Saturnus,* 512 F.2d 660 (1975).

[3] The *Kokesh* holding is in agreement with the decision of the district court in this case. We conclude that the district court has not erred. Unseaworthiness and negligence are two separate grounds of recovery. *See Alvarez,* 674 F.2d at 1041; *Thezan v. Maritime Overseas Corp.,* 708 F.2d 175, 180 (5th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 729, — L.Ed.2d — (1984). In the present case, the jury was instructed that these were two separate theories of recovery. The jury could well have concluded that the shipowner was negligent for allowing oil on the deck of his ship, but that oil on the deck of the ship did not render the vessel unfit to go to sea. The jury has the power to determine what facts constitute unseaworthiness just as it has the power to decide if there was negligence.

Appellants urge that the jury's answers are illogical because a "yes" answer to the negligence interrogatory necessarily found oil on the deck, while a "no" answer to the unseaworthiness interrogatory necessarily found no oil on the deck. However, as Emerson noted, "A foolish

consistency is the hobgobblin of little minds.'"[2] Although these answers may not achieve legal nicety, they are not irreconcilable. We do not have the right to second guess a jury that may decide a small oil spill on a deck does not necessarily make an 80,000 ton tanker unseaworthy even if the spill got there negligently. The Supreme Court observed in *Mitchell* that experience will sometimes triumph over logic:

> There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed. Such theories might be made to fill a volume of logic, but in view of the decisions in this Court over the last fifteen years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.

362 U.S. at 550, 80 S.Ct. at 933, 4 L.Ed.2d at 948.

[4] In the present case, the jury answers to the negligence and unseaworthiness interrogatories are not in irreconcilable conflict. Rather, they represent differing answers to two separate theories of recovery. The judgment was properly based upon the jury verdict. It must be upheld.

AFFIRMED.

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[2]R. W. Emerson, *Self-Reliance* (1841). Emerson also remarked, "With consistency a great soul has simply nothing to do." *Id.*

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3569

D.C. Docket No. CA82-4645-I

WALTER R. BRUNNER,

Plaintiff-Appellee,

versus

MARITIME OVERSEAS CORPORATION SECOND SHIPMOR ASSOCIATES, ET AL.,

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana

Before REAVLEY, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

January 3, 1986

ISSUED AS MANDATE:

## APPENDIX F

### EXCERPTS FROM OPENING AND CLOSING

A. *Plaintiff's opening statement:*

Plaintiff was "caused to slip and fall onto his back, while walking on the deck of that vessel because of an accumulation of oil that had not been properly removed and had been allowed to remain on that vessel. And as a result of that incident, Mr. Brunner suffered the injuries for which he has brought suit and which is the subject of this lawsuit. That's it in a nutshell. That's what the evidence will show". . . .

*Transcript*, p. 4

"At the end of trial, I will come back to you and at that time I will ask you make an award of money damages to Mr. Brunner to compensate him in this case for the injuries which we will prove to you was caused by the negligence of his employer and by the unseaworthiness of the vessel on which he was working, because we will prove to you that Mr. Brunner was caused to fall because an accumulation of oil that was on the deck of that vessel."

*Transcript*, p. 8.

B. *Defendant's opening statement:*

" . . . What the claim is, is that there was an oil spill on the deck of this ship and that Mr. Brunner claims he slipped and fell because of this oil spill. . . . Is there any real proof, or any real evidence, or any proof that there was any oil at all on this deck? The

evidence will show that there wasn't and I think that will be the decision in the case. . . . ''

*Transcript,* pp. 9 and 14.

C. *Plaintiff's Closing Statement:*

" . . . The evidence has shown in this case Walter Brunner was caused to suffer injuries because of both negligence and unseaworthiness. Because of an accumulation of oil that was allowed to remain on the deck of OVERSEAS OHIO that caused him to fall. . . . That deck isn't slippery just because of rain. It is painted a nonslip, nonskid paint, just to prevent people from slipping in rain. It's got an abrasive surface on there. What makes it slippery is oil. Will make someone's feet go up in the air and make him feel embarrassed that someone is watching him is oil. That's the only thing that can do that . . . .''

*Transcript,* p. 263.

D. *Defendants' closing statement:*

"Now, in this particular case, I think we said in the beginning, it's really not that difficult in terms of the factual issues. The question is, was there an accumulation of oil on this deck. When you look at the facts . . . I think you have to conclude, no, there wasn't. That ends the case.''

*Transcript,* p. 270.

## APPENDIX G

### EXCERPTS FROM JURY CHARGE

A. "Plaintiff alleges the vessel was unseaworthy because there was oil on the deck of the vessel."

*Transcript*, p. 300.

B. "Plaintiff alleges defendant was negligent because he allowed oil to accumulate on the deck of the OVERSEAS OHIO, thereby creating a slippery condition in an area where the crew normally walked."

*Transcript*, p. 297.

C. Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

*Transcript*, p. 298.

D. A claim of unseaworthiness is a claim that the owner of a vessel has not fulfiled his duty to members of the crew to provide a vessel reasonably fit for its intended purpose. The duty to provide a seaworthy ship extends not only to the vessel itself, but to all of its parts, equipment and gear; and also includes the responsibility of assigning an adequate crew.

The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate

the duty to anyone. If he does not provide a seaworthy vessel, then no amount of due care or prudence excuses him, whether he knew or could have known of the deficiency.

If, therefore, you find that a vessel was in any manner unsafe or unfit, and that such condition was a legal cause of damage to the Plaintiff, then you may find that the vessel was unseaworthy and the shipowner liable, without any reference to the issue of negligence of the Defendant or any of its employees.

The owner of the vessel is not required, however, to furnish an accident-free ship. A vessel is not called on to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

*Transcript*, pp. 300-301.